STATE OF MICHIGAN

COURT OF APPEALS

CHADWICK VANDONKELAAR, a Minor, by his next friend, TONYA LYN SLAGER, Plaintiff-Appellee,	FOR PUBLICATION September 30, 2010 9:00 a.m.
v	No. 292856 Ottawa Circuit Court
KID'S KOURT, L.L.C., and MARYANNE BARRINGER, Defendants-Appellants.	LC No. 08-063033-NO Advance Sheets Version

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

MURPHY, C.J.

Defendants appeal by leave granted the trial court's order denying their motions to file a notice of nonparties at fault and to amend their affirmative defenses, along with the court's order denying defendants' motion for reconsideration. This premises-liability case arose from injuries to his finger suffered by plaintiff, Chadwick Vandonkelaar (Chad), a minor, at defendants' daycare center. And defendants, while admitting liability, contended that some fault should be allocated to Chad's parents because they were negligent in failing to follow a prescribed course of medical treatment after surgical repair of the finger. The trial court, relying on *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18; 762 NW2d 911 (2009), held that there could be no allocation of fault in regard to the parents because they were immune from suit, which necessarily meant that they had no "legal duty" to obtain proper medical care, a prerequisite under *Romain* before any fault could be attributed to them under the comparative-fault statutes.[1] We affirm, although for reasons different from those offered by the trial court. We conclude that the comparative-fault statutes have no application in this case because, as a matter of law and indisputably, defendants were the only parties at fault and there were no other tortfeasors *with respect to the conduct that was the factual and proximate cause of the injuries to Chad's finger that occurred at the daycare center*. Any presumed negligence by the parents in regard to Chad's medical treatment after the injuries occurred at the daycare center did not trigger the need

[1] When we speak of the comparative-fault statutes, we refer to MCL 600.2956, MCL 600.2957, and MCL 600.6304.

to assess their fault for purposes of the comparative-fault statutes, given that such negligence was not part of the causal chain in regard to his finger's becoming crushed and lacerated in the first place. Rather, any negligent conduct by the parents constituted a subsequent, separate tort that initiated a new causal chain leading to its own set of damages, which, we note, would not be recoverable by Chad because of parental immunity. See *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972).

I. BACKGROUND

Chad, six years old at the time, sustained injuries while at defendants' daycare center in May 2007. Chad placed his right middle finger into the end of a metal pipe that held a large role of paper, and the pipe dislodged from the paper-roller frame, crushing and lacerating Chad's finger. The preoperative diagnosis indicated that Chad suffered a "middle finger extensor tendon injury" and an "[o]pen distal interphalangeal joint injury." Surgery on the finger was performed by Dr. Donald Condit, and the surgical procedure entailed repair of the extensor tendon, along with "middle finger debridement and repair with pinning of distal interphalangeal joint injury."

Defendants admitted their liability in relation to a premises-liability claim pursued by Chad, through his mother, Tonya L. Slager, next friend in October 2008, but defendants contested the extent of the damages.[2] The trial court limited discovery "to the question of the mechanics of the injury" and to Chad's "reaction, pain, and other damages."

In April 2009, defense counsel had the opportunity to meet with Dr. Condit, and they discussed the doctor's findings and opinions concerning Chad's injuries, treatment, and prognosis. Defense counsel averred, on the basis of the conversation at this meeting, that Dr. Condit had prescribed physical therapy once a week for four weeks following the surgery, but Chad had only attended an initial evaluation and one therapy session. Defense counsel further averred that Dr. Condit had indicated that it was his intent to have Chad attend at least 8 to 12 physical therapy sessions over a three-month period in order to improve the finger's range of motion as well as to alleviate stiffness and swelling in the fingertip. According to the affidavit filed by defense counsel, Dr. Condit informed counsel that the failure to continue with the therapy had a "very significant" effect on Chad's recovery.

On the basis of this information, defendants moved for leave to file a notice of nonparties at fault and to amend their affirmative defenses. Defendants sought to designate Chad's parents as nonparties at fault for their failure to follow Dr. Condit's advice and failure to ensure Chad's attendance at follow-up physician appointments and physical therapy. Defendants also sought to add affirmative defenses, alleging that Chad's injuries were caused by acts or omissions by his

[2] The trial court dismissed the claims of gross negligence and nuisance on defendants' motion for summary disposition.

parents that were beyond the control of defendants and reserving the right to have the trier of fact allocate fault under MCR 2.112(K).[3]

At the hearing on the motions, the parties agreed that Chad's parents were immune from civil liability, considering that their alleged inaction and failures pertained to Chad's medical care. Indeed, in *Plumley*, 388 Mich at 8, our Supreme Court abolished general intrafamily tort immunity, but with some exceptions, holding:

> A child may maintain a lawsuit against his parent for injuries suffered as a result of the alleged ordinary negligence of the parent. Like our sister states, however, we note two exceptions to this new rule of law: (1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.

See also *Spikes v Banks*, 231 Mich App 341, 348; 586 NW2d 106 (1998).[4]

Even though there was agreement that Chad's parents were protected by immunity, the parties vigorously disagreed about the effect of that immunity on the question whether fault could be allocated to the parents as nonparties, thereby potentially minimizing the extent of the damages that could be the responsibility of defendants. More specifically, the crux of the question in the trial court focused on whether a person or entity protected by immunity could nonetheless be named as a nonparty at fault. In answering that question, our Supreme Court's holding in *Romain* made it necessary to determine whether the nonparty owed a "legal duty" to the injured person. In *Romain*, 483 Mich at 20-22, the Michigan Supreme Court ruled as follows concerning the comparative-fault statutes:

> We write briefly to eliminate a conflict between two published Court of Appeals opinions. Specifically, we overrule the statement in *Kopp v Zigich* [268 Mich App 258, 260; 707 NW2d 601 (2005)] that "a plain reading of the

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[3] MCR 2.112(K) incorporates MCL 600.2957 and MCL 600.6304 and addresses procedural and notice requirements with respect to fault allocation.

[4] In determining whether a defendant was exercising reasonable parental authority, the question to be answered is not whether the defendant acted negligently, but whether the alleged act reasonably fell within one of the *Plumley* exceptions. *Spikes*, 231 Mich App at 348-349; *Phillips v Deihm*, 213 Mich App 389, 395; 541 NW2d 566 (1995). Here, the inaction at issue reasonably fell within one of the *Plumley* exceptions because Chad's parents were clearly exercising their discretion with respect to the provision of medical services and care. Again, there was and is no dispute on this matter.

comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated." That is an incorrect statement of Michigan law. In *Jones v Enertel, Inc* [254 Mich App 432, 437; 656 NW2d 870 (2002)], the Court of Appeals held that "a duty must first be proved before the issue of fault or proximate cause can be considered." Under the "first out" rule of MCR 7.215(J)(1), the *Kopp* panel should have followed *Jones* or declared a conflict under MCR 7.215(J)(2). Because the *Kopp* panel did not declare a conflict, *Jones* is the controlling precedent and proof of a duty *is* required "before fault can be apportioned and liability allocated" under the comparative fault statutes, MCL 600.2957 and MCL 600.6304.

In addition to being the controlling precedent under the court rules, *Jones* correctly stated Michigan negligence law; *Kopp* did not. As noted by this Court in *Riddle v McLouth Steel Products Corp* [440 Mich 85, 99; 485 NW2d 676 (1992)]:

> "'In a common law negligence action, before a plaintiff's fault can be compared with that of the defendant, it obviously must first be determined that the defendant was negligent. It is fundamental tort law that before a defendant can be found to have been negligent, it must first be determined that the defendant owed a legal duty to the plaintiff.'"

> The same calculus applies to negligent actors under the comparative fault statutes. A common-law negligence claim requires proof of (1) duty; (2) breach of that duty; (3) causation, both cause in fact and proximate causation; and (4) damages. Therefore, under Michigan law, a legal duty is a threshold requirement before there can be any consideration of whether a person was negligent by breaching that duty and causing injury to another. Thus, when the Legislature refers to the common-law term "proximate cause" in the comparative fault statutes, it is clear that for claims based on negligence "'it must first be determined that the [person] owed a legal duty to the plaintiff.'" Additionally, MCL 600.6304(8) includes in the definition of fault "a breach of a legal duty . . . that is a proximate cause of damage sustained by a party." Before there can be "a breach of a legal duty," there must be a legal duty. Without owing a duty to the injured party, the "negligent" actor could not have proximately caused the injury and could not be at "fault" for purposes of the comparative fault statutes. [Citations omitted; some alteration in original.]

The trial court concluded that the immunity enjoyed by Chad's parents precluded defendants from naming them as nonparties at fault because their immunity exempted them from having any legal duty to obtain medical care for Chad. Accordingly, the trial court denied defendants' motion and the subsequent motion for reconsideration. This Court then granted defendants' application for leave to appeal. *Slager v Kids Court, LLC*, unpublished order of the Court of Appeals, entered July 14, 2009 (Docket No. 292856).

II. ANALYSIS

For the reasons set forth later in this opinion, we find it unnecessary to determine whether Chad's parents had a legal duty to obtain medical care for him despite their immunity from liability because we conclude that the comparative-fault statutes are simply not implicated regardless of any parental duty.

A. STANDARD OF REVIEW

The issue on which we base our holding concerns interpretation of the comparative-fault statutes. Statutory construction is a question of law subject to review de novo. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

B. JOINT AND SEVERAL LIABILITY BEFORE ENACTMENT OF THE COMPARATIVE-FAULT STATUTES

In *Kaiser v Allen*, 480 Mich 31, 37; 746 NW2d 92 (2008), our Supreme Court, examining MCL 600.2957 and MCL 600.6304, stated:

> The tort-reform statutes have abolished joint and several liability in cases in which there is more than one tortfeasor actively at fault. Traditionally, before tort reform, under established principles of joint and several liability, when the negligence of multiple tortfeasors produced a single indivisible injury, the tortfeasors were held jointly and severally liable. *Watts v Smith*, 375 Mich 120, 125; 134 NW2d 194 (1965); *Maddux v Donaldson*, 362 Mich 425, 433; 108 NW2d 33 (1961).

In *Watts*, 375 Mich at 125, the Michigan Supreme Court, quoting *Meier v Holt*, 347 Mich 430, 438-439; 80 NW2d 207 (1956), observed:

> "'Although it is not always definitely so stated the rule seems to have become generally established that, although there is no concert of action between tort-feasors, if the cumulative effect of their acts is a single, indivisible injury, which it cannot certainly be said would have resulted but for the concurrence of such acts, the actors are to be held liable as joint tort-feasors; whereas, if the results, as well as the acts, are separable, in theory at least, so that it can be said that the act of each would have resulted in some injury, however difficult it may be as a practical matter to establish the exact proportion of injury caused thereby, each can be held liable only for so much of the injury as was caused by his act.' (1 Cooley on Torts [4th ed], § 86, pp 279, 280)." [Alteration in original.]

Under the principles of joint and several liability, tortfeasors could be held jointly and severally liable despite there being no common duty, common design, or concert of action as long as their negligence produced a single, indivisible injury. *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 252; 660 NW2d 344 (2003).

Here, it cannot be concluded that defendants' negligence and the parents' presumed negligence produced a single, indivisible injury, the injuries being a "middle finger extensor

tendon injury" and an "[o]pen distal interphalangeal joint injury." Any negligence by the parents was not a cause of the tendon and joint injuries brought about by the occurrence at the daycare center. Rather, the acts of defendants, as well as the results of their tortious conduct, are separable from the acts of the parents, as well as the results of the parents' assumed tortious conduct, so that "'"it can be said that the act[s] of each would have resulted in some injury, however difficult it may be as a practical matter to establish the exact proportion of injury caused thereby."'" *Watts*, 375 Mich at 125 (citations omitted). Therefore, under the principles of joint and several liability that existed before the enactment of the comparative-fault statutes, defendants and the parents[5] in the instant case could only have been held severally liable, i.e., liable "'"only for so much of the injury as was caused by his act."'" *Id.* (citations omitted). A court could not have imposed joint and several liability.

C. THE COMPARATIVE-FAULT STATUTES

As indicated in *Kaiser*, 480 Mich at 37, the "tort-reform statutes . . . abolished joint and several liability in cases in which there is more than one tortfeasor actively at fault." Indeed, the Legislature expressed that sentiment in MCL 600.2956, wherein it is provided:

> Except as provided in [MCL 600.6304 (an exception not applicable here)], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

Accordingly, because the purpose of enacting the comparative-fault statutes was to eliminate joint and several liability in situations in which that liability existed, and because the case at bar is not one in which there would have been joint and several liability before enactment of the statutes, the comparative-fault statutes are not applicable here. There was no need for the legislation to address situations in which there would solely be several liability based on existing common law, considering that simple causation-damage principles would effectively result in a tortfeasor's only being held responsible for injuries caused by his or her tortious conduct. However, it is necessary to examine the language in MCL 600.2957 and MCL 600.6304 to see if they are consistent with our conclusion. MCL 600.2957 provides, in relevant part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

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[5] For purposes of this opinion and our analysis, we are effectively treating the two defendants as a single unit and the two parents as a single unit.

* * *

(3) Sections 2956 to 2960 [MCL 600.2956 to 600.2960] do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

We find nothing in MCL 600.2957 that conflicts with our assessment that the comparative-fault statutes are inapplicable with respect to fact patterns entailing multiple torts separated in time, multiple torts separated by individual causal chains, and multiple torts that did not produce a single, indivisible injury.

MCL 600.6304 provides, in pertinent part:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d], regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1). . . . and shall enter judgment against each party, including a third-party defendant . . . .

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6) [medical malpractice cases], a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). . . .

* * *

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or

> any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

As indicated already, MCL 600.6304(1)(b) requires the trier of fact to allocate the "percentage of the total fault of all persons that contributed to the *death or injury* . . . ."[6] (Emphasis added.) Again, there is no dispute that Chad's parents did not contribute to the cause of Chad's injuries, i.e., the tendon and joint injuries produced by the underlying occurrence at the daycare center, although their inaction may have caused Chad to later suffer separate, more extensive, and divisible damage. At this point, it is appropriate to note, for purposes of the comparative-fault statutes, that the concepts of "injury" and "damages," while interrelated, are two distinct concepts. In *Shinholster v Annapolis Hosp*, 471 Mich 540, 552 n 6; 685 NW2d 275 (2004), the Court, construing MCL 600.6304, indicated that "damage cannot arise on its own, but must flow from an injury" and that "[d]amage can only be the result of an injury." The *Shinholster* Court continued, stating, "[F]irst an injury to plaintiff must exist and the trier of fact must then determine whether plaintiff[7] *constituted a proximate cause of such injury before* there is any need for the trier of fact to focus on plaintiff's damages." *Id.* (emphasis added).

As indicated already, MCL 600.6304(2) requires the trier of fact, in "determining the percentages of fault *under subsection (1)(b)*," to "consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed." (Emphasis added.) This language is simply to be incorporated into and made a part of the assessment that must be undertaken in regard to MCL 600.6304(1)(b), which, again, focuses on contribution to the "injury." Accordingly, when subsections (1)(b) and (2) of MCL 600.6304 are read together, consideration of the causal relation between the conduct and the claimed damages means consideration of conduct that jointly contributed to the injury and the damages flowing from that particular conduct and resulting injury. Those statutory subsections, when read together, do not direct a trier of fact to consider damages unrelated to conduct that produced or caused the underlying injury. Once again, the conduct or inaction of Chad's parents played no role in causing the tendon and joint injuries and the incident producing those injuries. Therefore, MCL 600.6304 would not even permit the trier of fact to consider any injuries that the parents may have caused Chad to suffer. The parents' conduct constituted a possible subsequent, separate tort that was not part of the causal chain with respect to the finger injuries and the occurrence at the daycare center.

Finally, we examine MCL 600.6304(8), which defines "fault" as conduct "that is a proximate cause of damage sustained by a party." This provision must also be read in the context of the "fault" allocation that the trier of fact must make under MCL 600.6304(1)(b).

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[6] Because the instant case involves an injury and not a death, we shall solely use the term "injury" for the remainder of this opinion when discussing the statutory language.

[7] *Shinholster* concerned whether any fault could be allocated to the plaintiff's decedent for causing her own death; however, the quoted language would be equally applicable to any other party or nonparty alleged to be at fault for causing an injury or death.

Accordingly, the examination of whether a person's conduct was a "proximate cause of damage sustained by a party," MCL 600.6304(8), necessarily means conduct that contributed to the injury and the damages flowing from that particular conduct and resulting injury. The conduct or inaction of Chad's parents was not the factual or proximate cause of Chad's tendon and joint injuries that he suffered at the daycare center. Accordingly, their conduct could not constitute fault for purposes of the statutory definition of "fault" found in MCL 600.6304(8).

In sum, the comparative-fault statutes are not implicated under the circumstances of this case.[8] However, on remand, and under general principles of tort law, plaintiff will have to prove by a preponderance of the evidence that any claimed damages were the factual and proximate result of defendants' negligence, and defendants' negligence alone, which will potentially afford defendants some protection from being assessed damages that they did not cause. See *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977).

III. CONCLUSION

We hold that the comparative-fault statutes have no application in this case because, as a matter of law and indisputably, defendants were the only parties at fault and there were no other tortfeasors with respect to the conduct that was the factual and proximate cause of the injuries to

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[8] The dissent takes us to task for deciding this case on a theory that was neither raised in the trial court nor raised or briefed on appeal. We do note that the broad issue raised on appeal and addressed by us concerns whether the comparative-fault statutes are applicable, although we acknowledge that our analysis and approach with respect to that issue differs entirely from the arguments presented by the parties. In *Mack v Detroit*, 467 Mich 186, 206; 649 NW2d 47 (2002), our Supreme Court addressed and analyzed a governmental-immunity issue that was neither raised nor briefed by the parties, but the issue was a topic of discussion at oral argument. The *Mack* Court adamantly opposed the "position that although a controlling legal issue is squarely before this Court, . . . the parties' failure . . . to offer correct solutions to the issue limits this Court's ability to probe for and provide the correct solution." *Id.* at 207. The Court continued by noting that "[s]uch an approach would seriously curtail the ability of this Court to function effectively and . . . actually make oral argument a moot practice." *Id.* At oral argument here, counsel for both parties were questioned regarding whether it could be argued that the comparative-fault statutes were not implicated because there was clearly no fault on the part of Chad's parents in connection with the injury-producing incident. Were we to decide this case on the duty-versus-immunity arguments under the facts presented, we would implicitly be conveying to the bench and bar that the comparative-fault statutes are indeed generally implicated in circumstances in which a party or nonparty was not the proximate cause of a plaintiff's injury or the injury-producing incident. In our estimation, however, this is not a correct legal conclusion for the reasons already stated. Consistently with *Mack*, we find that a controlling legal issue is squarely before us and must be analyzed regardless of the lack of briefing and the failure to raise the issue.

Chad's finger in the occurrence at the daycare center. Any presumed negligence by the parents in regard to Chad's medical treatment after the injuries occurred at the daycare center did not trigger the need to assess their fault for purposes of the comparative-fault statutes, given that such negligence was not part of the causal chain in regard to his finger's becoming crushed and lacerated in the first place. Rather, any negligent conduct by the parents constituted a subsequent, separate tort that initiated a new causal chain leading to its own set of damages. However, on remand, and under general principles of tort law, plaintiff will have to prove by a preponderance of the evidence that any claimed damages were caused solely by defendants' negligence.

Affirmed and remanded. Given our resolution of this appeal on grounds not addressed by the parties, we decline to award any party taxable costs. MCR 7.219(A).

/s/ William B. Murphy
/s/ David H. Sawyer